IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENNARO RAUSO	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	No. 98-5273
DONALD VAUGHN		

ORDER-MEMORANDUM

AND NOW, this 16th day of December, 1998, upon consideration of Magistrate Judge Diane M. Welsh's Report and Recommendation and petitioner Gennaro Rauso's objections,[1] the following is ordered:

1. The Report and Recommendation is approved and adopted.

2. Petitioner's pro se petition for writ of habeas corpus is denied for failure to exhaust.[2]

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[1] Petitioner filed two sets of objections, received December 1, 1998 and December 4, 1998, both of which were considered.

[2] Petitioner objects that the Report and Recommendation improperly treated his petition under 28 U.S.C. § 2254 rather than § 2241, and therefore erroneously applied the exhaustion requirement. Section 2254 appears to be the appropriate provision for this action. See Burkett v. Love, 89 F.3d 135 (3d Cir. 1996) (treating state prisoner's habeas challenge to denial of parole under § 2254); Bonilla v. Vaughn, 1998 WL 480833, *6 and n.3 (E.D. Pa. 1998) (discussing case law that suggests state prisoners' challenges to parole board decisions are properly brought under § 2254). However, such claims have been considered under § 2241 as well. See, e.g., George V. Vaughn, 1998 WL 188847, *2 (E.D. Pa. 1998). Nevertheless, the exhaustion requirement is the same under each. Schandelmeier v. Cunningham, 819 F.2d 52, 53 (3d Cir. 1986); Moore v. DeYoung, 515 F.2d 437, 442 (3d Cir. 1975), quoted in Deblase v. Roth, 1996 WL 11303, *3 n.6 (E.D. Pa. 1996).

3. Petitioner's motion to amend the petition and motion for appointment of counsel are moot.

4. There is no probable cause to issue a certificate of appealability.

As discussed in the Report and Recommendation, the decision in Burkett v. Love, 89 F.3d 135 (3d Cir. 1996), is binding on this court. There, our Court of Appeals predicted that the Pennsylvania Supreme Court would entertain constitutional challenges to denials of parole and that habeas petitioners must exhaust state court remedies before bringing such challenges to federal court. Id. at 142. In 1997, two subsequent decisions of the Pennsylvania Commonwealth Court explicitly disagreed with Burkett - Weaver v. Board of Probation and Parole, ___ Pa. Commw. ___, 688 A.2d 766 (1997) and Elridge v. Board of Probation and Parole, ___ Pa. Commw. ___, 688 A.2d 273 (1997). This year, the issue has received contradictory treatment from judges of this court, compare McCoy v. Dragovich, 1998 WL 639192 (E.D. Pa. 1998) (Shapiro, J.) (dismissing petition challenging parole board decision for failure to exhaust) and Bonilla v. Vaughn, 1998 WL 480833 (E.D. Pa. 1998) (Dubois, J.) (finding exhaustion futile). The 1996 decision of the Court of Appeals is considered to be the authoritative view inasmuch as there has not been a subsequent decision by the Pennsylvania Supreme Court.[3]

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[3] Our Court of Appeals affirmed Burkett this summer in an unpublished panel opinion. Terry v. Price, No. 97-cv-01353 (3d Cir. July 16, 1998). Noting the contrary Commonwealth Court (continued...)

Since the filing of the present action, petitioner has also filed two actions in the Commonwealth Court for review of the parole board's decision, both of which were dismissed on grounds that such decisions are not subject to review. Rauso v. Board of Probation and Parole, No. 712 M.D. 1998 (Pa. Commw. 1998) (per curiam); Rauso v. Bushey, No. 3059 C.D. 1998 (Pa. Commw. 1998) (per curiam). However, exhaustion requires that a claim be presented at least once to the state's highest court. Chaussard v. Fulcomer, 816 F.2d 925, 927 (3d Cir. 1987); Butler v. Zimmerman, 1995 WL 29038, *2 (E.D. Pa. 1995). Because petitioner does not appear to have appealed either dismissal to the Pennsylvania Supreme Court, his claims cannot be considered exhausted, and his petition must be denied.

Edmund V. Ludwig, J.

[3](...continued)
decisions, Terry stated "we rely on Burkett as our prediction of how the State's highest court would decide this issue, as we are required to do in the absence of an authoritative pronouncement from that court." Terry, at 3 n.2.